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Opinion after recalling remittitur

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CODY KEITH GARLAND, Defendant and Appellant.	C082670 (Super. Ct. No. 15F06523) OPINION ON REMAND

Following a jury trial, defendant Cody Keith Garland was convicted of two counts of second degree burglary (Pen. Code, § 459; statutory section references that follow are to this code), unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), receiving a stolen vehicle (§ 496d, subd. (a)), forgery (§ 470, subd. (d)), four counts of misdemeanor identity theft (§ 530.5, subd. (c)(1)), possession of burglary tools (§ 466), and providing false identifying information to an officer (§ 148.9, subd. (a)). The trial court sustained three prior prison term allegations (§ 667.5, subd. (b)) and a prior vehicle theft allegation (§ 666.5, subd. (a)) and sentenced defendant to a split term of eight years four months in state prison and a consecutive five-year county jail term for the

misdemeanors, with the last 18 months of the sentence on mandatory supervision. The court also imposed restitution fines and various fees.

On appeal, defendant contends he was improperly convicted of one of the burglary counts and the forgery count, and there was insufficient evidence to support two of the identity theft counts. Following the California Supreme Court's remand and our recalling the remittitur, defendant further contends Senate Bill No. 136, effective January 1, 2020, requires us to strike the three prior prison term enhancements, and *People v. Duenas* (2019) 30 Cal.App.5th 1157 requires us to remand so the trial court may consider defendant's ability to pay the fines and fees imposed. We shall modify the judgment to reduce the burglary conviction in count one to shoplifting (§ 459.5), remand to strike the prior prison term enhancements and for resentencing, and otherwise affirm the judgment.

FACTS AND PROCEDURAL HISTORY

In July 2015, Shevaun Holmes and her husband Pierre Holmes lived in a Greenhaven apartment complex. The Holmes's typically paid rent with a money order for $500 and another money order for $325, with Pierre Holmes dropping it through the mail slot near the front door of the rental office. They paid the July 2015 rent on July 4; the money orders were filled out but the payee line was left blank. The $500 money order disappeared, and was later cashed by defendant at a Check 'n Go store after he wrote his name on the payee line. Defendant told an officer he had cashed the money order. When he went to cash it, the clerk told him the payee line was blank, so he filled it in with his name.

The manager at a different apartment complex in Greenhaven related how rent was paid by tenants, either in person or by dropping it off through a drop box. Video surveillance at the complex taken between September 27, 2015, and October 5, 2015, showed defendant and several acquaintances repeatedly reaching into the box and removing documents.

On October 17, 2015, officers responding to a traffic camera notification of a stolen 1999 Honda Civic found the car parked at a gas station with defendant standing right next to the driver's side and a person later identified as Samantha Dean standing next to an open car door on the passenger side. The Honda was reported stolen on July 18, 2015. As soon as defendant noticed the police, he immediately turned around and walked to a Chevrolet pickup truck, put something in the truck's bed, and walked to the front of the gas station. Dean walked to the passenger side of the truck and reached through an open window. Defendant and Dean were detained; defendant provided a false name when asked for identification.

The Honda's hood was warm to the touch. An officer located two flathead screwdrivers on the driver's side floorboard, and was able to turn on the ignition with one of them. A cell phone in the center console contained defendant's name, e-mail address, and text messages addressed to him.

During a search of the truck, officers found Department of Motor Vehicles paperwork containing defendant's name, along with many keys, including shaved keys commonly used to manipulate ignitions in order to steal cars. The truck also contained various documents belonging to at least 10 different people. Among the documents were an airline boarding pass, medical records, and receipts belonging to Bobby Jones, checkbooks, a medical insurance card, and Social Security card belonging to Julia Kressin, a W-2 wage statement, bank letter, and personal identification number belonging to Annclaire Mendoza, a school schedule containing the name and address of Mendoza's son, Vincent Salvitti, and an invoice for eyeglasses and a related rebate form for Adriana Lupian that included her name, address, e-mail address, and date of birth.

In 2014, Mendoza, Salvitti, and Jones lived together but were forced out of their home after it caught fire. Many of their possessions were left in the house after the fire. Items belonging to them found in defendant's truck were taken from the home, and

defendant did not have permission to have them. The items belonging to Lupian had been deposited by her in the slot for outgoing mail at her apartment complex.

DISCUSSION

I

The Burglary and Forgery Counts

Defendant contends his conviction for second degree burglary related to cashing the forged money order at the Check 'n Go (count one) must be reduced to shoplifting (§ 459.5) and the shoplifting statute precludes prosecution for the forgery offense (count five). The Attorney General concedes on the burglary count but argues prosecution on the forgery count was not precluded by section 459.5. We agree with the Attorney General.

Among the changes brought by Proposition 47 (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014)) was the creation of the new crime of shoplifting through section 459.5. "(a) Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170. [¶] (b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property." (§ 459.5.)

At the time of defendant's trial, it was an open question whether section 459.5 applied only to commercial burglaries committed by larceny or applied to such burglaries committed through other forms of theft such as theft by false pretenses. In a case decided while this appeal was pending, the California Supreme Court held that section 459.5 applied to commercial burglaries committed through any form of theft, not just theft by larceny. (*People v. Gonzales* (2017) 2 Cal.5th 858, 862 (*Gonzales*).)

The burglary conviction in count one was based on the theft by false pretenses of $500 (the amount of the forged money order) from the Check 'n Go by defendant during regular business hours. Applying *Gonzales*, we conclude the burglary count was preempted by section 459.5 and shall modify the burglary conviction in count one to the shoplifting offense. Since this conviction was the principal count at sentencing, a remand for resentencing is necessary.

Defendant's contention regarding the forgery count is based on the language in subdivision (b) of section 459.5 stating that any act of shoplifting under the statute "shall be charged as shoplifting" and our Supreme Court's application of this statutory language in *Gonzales.* In *Gonzales*, the Attorney General argued that even if a burglary committed through theft by false pretenses was subject to section 459.5, that statute did not apply because the defendant in *Gonzales* also harbored the intent to commit a nontheft felony, identity theft, when he entered the commercial establishment. (*Gonzales, supra*, 2 Cal.5th at p. 876.) The Supreme Court rejected this argument as follows: "Section 459.5, subdivision (b) requires that any act of shoplifting 'shall be charged as shoplifting' and no one charged with shoplifting 'may also be charged with burglary or theft *of the same property*.' (Italics added.) A defendant must be charged only with shoplifting when the statute applies. It expressly prohibits alternate charging and ensures only misdemeanor treatment for the underlying described conduct. The statute's use of the phrase 'the same property' confirms that multiple burglary charges may not be based on entry with intent to commit different forms of theft offenses if the property intended to be

stolen is the same property at issue in the shoplifting charge. Thus, the shoplifting statute would have precluded a burglary charge based on an entry with intent to commit identity theft here because the conduct underlying such a charge would have been the same as that involved in the shoplifting, namely, the cashing of the same stolen check to obtain less than $950. A felony burglary charge could legitimately lie if there was proof of entry with intent to commit a nontheft felony or an intent to commit a theft of other property exceeding the shoplifting limit. That did not occur here, however." (*Gonzales*, *supra*, at pp. 876-877, italics omitted.) According to defendant, the Supreme Court's interpretation of section 459.5 precludes his prosecution (and therefore conviction) for forgery because the forgery and burglary crimes involved the same underlying conduct.

Gonzales addressed whether the defendant could be prosecuted for second degree burglary based on an intent to commit a nontheft felony. It did not address the situation here, whether a defendant can be prosecuted for a nontheft misdemeanor that involved conduct that was also part of the shoplifting crime. Cases are not authority for propositions not considered therein. (*Siskiyou County Farm Bureau v. Department of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 437, fn. 11.) As interpreted in *Gonzales*, section 459.5, subdivision (b) mandates that burglaries committed by thefts of any sort for less than $950 are treated as the misdemeanor crime of shoplifting, and that an intent to commit a nontheft felony does not support liability for second degree burglary unless the felonious intent is not related to the underlying larceny. It has no application to the issue before us.

"We interpret voter initiatives as we interpret all legislative enactments: ' "we begin with the text as the first and best indicator of intent." ' [Citation.]" (*People v. Valencia* (2017) 3 Cal.5th 347, 388.) Accordingly, we consider the ordinary meaning of the language, the text of related provisions, terms used in other parts of the statute, and the overall structure of the statutory scheme. (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 209.)

By its terms, section 459.5 precludes only prosecutions for theft or burglary. (§ 459.5, subd. (b) ["No person who is charged with shoplifting may also be charged with *burglary or theft* of the same property"]; see also *id*. subd. (a) ["Notwithstanding section 459 shoplifting is defined as . . . ."].) A prosecution for forgery is not a prosecution for theft or burglary.

"Forgery has three elements: a writing or other subject of forgery, the false making of the writing, and intent to defraud. [Citation.]" (*People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741.) "An intent to defraud is an intent to deceive another person for the purpose of gaining a material advantage over that person or to induce that person to part with property or alter that person's position by some false statement or false representation of fact, wrongful concealment or suppression of the truth or by any artifice or act designed to deceive. [Citation.]" (*People v. Pugh* (2002) 104 Cal.App.4th 66, 72.) Making the forged instrument with an intent to defraud is sufficient to constitute forgery and does not require either passing the instrument or obtaining a material advantage by it so long as there is an intent to defraud. " 'The crime of forgery as denounced by statute (Pen. Code, § 470) consists of either of two distinct acts—the fraudulent making of an instrument, such as a false writing thereof, or the uttering of a spurious instrument by passing the same as genuine with knowledge of its falsity [citation]; and although both acts may be alleged in the conjunctive in the same count in the language of the statute, the offense does not require the commission of both—it is complete when one either falsely makes a document without authority or passes such a document with intent to defraud [citations], and the performance of one or both of these acts with reference to the same instrument constitutes but a single offense of forgery. [Citation.]' [Citation.]" (*People v. Kenefick* (2009) 170 Cal.App.4th 114, 123; see 2 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against Property, § 177, pp. 225-226.) While forgery is often used to accomplish a theft, no variant of the crime requires an intent to permanently deprive the owner of possession of property. It

therefore is not a form of theft. (See *People v. Avery* (2002) 27 Cal.4th 49, 54 [theft requires intent to permanently deprive owner of possession].)

Defendant's reliance on the treatment of Vehicle Code section 10851 is misplaced. Vehicle Code "section 10851[, subdivision] (a) 'proscribes a wide range of conduct.' [Citation.] A person can violate [Vehicle Code] section 10851[, subdivision] (a) 'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).' [Citations.]" (*People v. Garza* (2005) 35 Cal.4th 866, 876.) Defendant asks us to take a similar approach to the forgery statute. We decline. There are not theft and nontheft variants of forgery. The issue addressed in *Garza*, whether a conviction under Vehicle Code section 10851 bars a conviction under section 496, subdivision (a) for receiving the same vehicle as stolen property (see *People v. Garza*, *supra*, at p. 871), has no analog in the context of the forgery statute. Defendant has not found a case interpreting section 470 in the manner the vehicle theft statute was interpreted by the Supreme Court in *Garza*, and we decline to do so here. Section 459.5 does not preclude his forgery conviction.

II

Identity Theft

Defendant contends there is insufficient evidence to support the convictions for identity theft in counts eight (Vincent Salvitti) and nine (Adriana Lupian).

In determining the sufficiency of the evidence, we ask whether, " 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Hatch* (2000) 22 Cal.4th 260, 272, italics omitted.) We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.

[Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) " ' " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' [Citations.]" (*People v. Casares* (2016) 62 Cal.4th 808, 823-824.) Thus, reversal is not warranted unless there is no hypothesis on which there exists substantial evidence to support the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information, as defined in subdivision (b) of Section 530.55," is guilty of identity theft. (§ 530.5, subd. (c)(1).) Defendant asserts there is insufficient evidence that he had the necessary intent to defraud with respect to the personal identifying information of Salvitti or Lupian. In support of his argument, he relies heavily upon *People v. Truong* (2017) 10 Cal.App.5th 551. In *Truong*, during a search of a bank employee's home, officers found a spreadsheet with 48 customers' names and account numbers and an account application with a coworker's name and credentials. (*Id.* at pp. 554, 555.) The defendant was convicted of several crimes, including two counts of section 530.5, subdivision (c)(1) based on the spreadsheet and account application. (*People v. Truong*, *supra*, at pp. 553-554.) The Court of Appeal found sufficient evidence to support both convictions, finding the circumstantial evidence of intent to defraud "overwhelming." (*Id*. at p. 559.) Defendant compares the evidence in this case to that in *Truong*, and finds the evidence of his guilt to be wanting.

Even assuming defendant is correct and there is less evidence supporting defendant's guilt in this case than in *Truong*, this does not establish or even support the argument that the evidence was insufficient to support his guilt. As we have already observed, the evidence of guilt in *Truong* was overwhelming. Evidence of guilt less than overwhelming will support a conviction so long as it is substantial. Such is the case here.

The personal identifying information of Salvitti found in defendant's possession was Salvitti's high school schedule that depicted his name and address. A person's name and address are among the items of personal information that come within the ambit of identity theft. (§ 530.55, subd. (b).) These items had been taken from his burned-out home. They were among the personal information of at least 10 people found in defendant's truck, which included personal information from his mother and Jones that were also taken from the burned-out home without permission. A jury could reasonably infer an intent to defraud from the fact that this information was intended to be used fraudulently, just like the trove of identifying information taken from the other people. The fact that defendant does not contest the sufficiency of the evidence for the identity theft counts related to Jones (count six) and Mendoza's (count seven) identifying information is particularly telling. If the jury could reasonably find this identifying information was obtained with the intent to defraud, then it could do so with regards to Salvitti's, which was taken from the same place. The jury could make the similar reasonable inference of intent to defraud with regards to Lupian's identifying information. Her information—name, address, e-mail address, and date of birth—was statutorily protected. (§ 530.55, subd. (b).) That information was taken from her apartment complex's slot for outgoing mail and was with all the other identifying information found in defendant's truck, again supporting the inference that it was all to be used for a fraudulent purpose.

III

Section 667.5

In supplemental briefing, defendant claims he no longer qualifies for the three one-year enhancements imposed under section 667.5, subdivision (b). He contends Senate Bill No. 136 (SB 136), enacted this year to amend section 667.5, requires the enhancements be stricken. The Attorney General agrees with defendant, as do we.

When defendant was sentenced, section 667.5, subdivision (b) provided for a one-year enhancement for each prior prison term served for "any felony," with an exception not applicable here. SB 136 significantly limits the circumstances under which this enhancement may be imposed. Under the new law, a trial court may impose the one-year enhancement only when the prior prison term was served for a sexually violent offense as defined in Welfare and Institutions Code section 6600, subdivision (b). (Stats. 2019, ch. 590, § 1.) Defendant has not served a prior prison term for a sexually violent offense.

SB 136 became effective January 1, 2020. (Cal. Const., art. IV, § 8, subd. (c)(2).) Defendant's conviction was not final by that date and is still not final due to our recalling the remittitur. Because the new law mitigates punishment and there is no saving clause, it operates retroactively. (*In re Estrada* (1956) 63 Cal.2d 740, 748; *People v. Lopez* (2019) 42 Cal.App.5th 337, 341-342.) We thus shall direct the trial court on resentencing to strike the enhancements imposed on defendant under section 667.5, subdivision (b).

IV

Citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), defendant contends the matter must be returned to the trial court for a hearing on his ability to pay the fines and fees ordered by the trial court. The Attorney General claims the defendant does not have a constitutional right to an ability-to-pay hearing for the restitution fine, but that on remand defendant should have the opportunity to show his inability to pay the court facilities and operations fees.

We hold that *Dueñas* was wrongly decided regarding the issue of hearings on the ability to pay fines and fees before they are ordered by the trial court. We recognize that the California Supreme Court has granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844, on the issue of whether a trial court must consider "a defendant's ability to pay before" imposing or executing fines, fees, and assessments, and if so, which party bears the burden of proof regarding

defendant's inability to pay. We nonetheless rule on the issue to allow the case to proceed.

Dueñas held "due process of law requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under []section 1465.8 and Government Code section 70373." (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.) The *Dueñas* court also held "that although []section 1202.4 bars consideration of a defendant's ability to pay [a restitution fine] unless the judge is considering increasing the fee over the statutory minimum, the execution of any restitution fine imposed under this statute must be stayed unless and until the trial court holds an ability to pay hearing and concludes that the defendant has the present ability to pay the restitution fine." (*Ibid*.)

The *Dueñas* opinion relies on a line of authorities beginning with *Griffin v. Illinois* (1956) 351 U.S. 12 [100 L.Ed. 891], which itself rested on the "constitutional guaranties of due process and equal protection" and struck down a state practice of granting appellate review only to individuals who could afford a trial transcript. (*Griffin* at pp. 13, 17; see *Dueñas, supra*, 30 Cal.App.5th at pp. 1166-1169.) As recent appellate court cases have illustrated, the authorities *Dueñas* cites involving the right of access to courts are inapplicable because the imposition of the fine and assessments at issue in *Dueñas* and in this proceeding do not deny defendants access to the courts. (*People v. Hicks* (2019) 40 Cal.App.5th 320, 326, review granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1068-1069; *People v. Caceres* (2019) 39 Cal.App.5th 917, 927; see also *People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1039 (conc. opn. of Benke, J.).) *Griffin* also stated broadly, "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (*Griffin, supra*, at p. 19.) Another line of cases relied upon by *Dueñas* is related by this "principle of 'equal justice' " and prohibits imprisonment based on the failure to pay criminal penalties where the nonpayment was due to indigence. (*Bearden v. Georgia* (1983) 461 U.S. 660, 661-

662, 664 [76 L.Ed.2d 221]; accord *In re Antazo* (1970) 3 Cal.3d 100, 103-106, 109-110; see *Dueñas, supra*, at pp. 1166-1168.)

The fine and assessments at issue in *Dueñas* and this appeal subject an indigent defendant "only to a civil judgment that she [or he] cannot satisfy." (*Dueñas, supra*, 30 Cal.App.5th at p. 1167; see also *id*. at p. 1169.) Thus, the authorities prohibiting incarceration for indigence alone are inapplicable. (*People v. Hicks*, *supra*, 40 Cal.App.5th at p. 326, review granted; *People v. Caceres, supra*, 39 Cal.App.5th at p. 927.) Indeed, in *In re Antazo, supra*, 3 Cal.3d 100, our Supreme Court granted the petition for the writ of habeas corpus only to discharge the petitioner from his imprisonment resulting from his inability to pay the fine and penalty assessment imposed as a condition of probation, but did not relieve him from any obligations in his probation order. (*Id*. at p. 117.) The court explained, "[W]e *do not* hold that the imposition upon an indigent offender of a fine and penalty assessment, either as a sentence or as a condition of probation, constitutes of necessity in all instances a violation of the equal protection clause." (*Id*. at p. 116, italics added.) In other words, "*Dueñas* does more than go beyond its foundations; it announces a principle inconsistent with them." (*People v. Hicks, supra*, 40 Cal.App.5th at p. 327, review granted.)

Further, "the fundamental policy question presented in *Dueñas* is a nettlesome one—namely, under what circumstance is it appropriate to require criminal defendants, many of whom are people of little or no means, to pay assessments that help defray the costs of operating the court system and restitution fines that pour into a statewide fund that helps crime victims?" (*People v. Hicks, supra*, 40 Cal.App.5th at p. 328, review granted.) This "is a question to which . . . the federal and California Constitutions do not speak and thus have left to our Legislature." (*Id*. at p. 329, review granted.)

We join those authorities that have concluded that the principles of due process and equal protection do not supply a procedure for objecting to the fines and assessments at issue in *Dueñas* and in this proceeding based on the present ability to pay. (*People v.*

Hicks, supra, 40 Cal.App.5th at p. 329, review granted; *People v. Aviles, supra*, 39 Cal.App.5th at p. 1069; *People v. Caceres, supra*, 39 Cal.App.5th at p. 928.) To the extent it announced this broad rule, *Dueñas* was wrongly decided and defendant's claim pursuant thereto is without merit.

Nor has defendant persuaded us that imposition of the fines and fees in this case violated his Eighth Amendment right against excessive fines, as that right was recently described by the United States Supreme Court in *Timbs v. Indiana* (2019) __ U.S. __ [203 L.Ed.2d 11]. Defendant has cited us to no authority, nor have we discovered any on our own, supporting the position that the fines and fees imposed in this case are excessive in relation to either the gravity of defendant's offense or his economic situation. (*Id*. at p. __ [203 L.Ed.2d at p. 17].)

DISPOSITION

The judgment is modified to reduce the burglary conviction in count one to shoplifting (§ 459.5) and the matter remanded to the trial court for resentencing. As part of resentencing, the court shall strike the three enhancements imposed under section 667.5, subdivision (b). In all other respects, the judgment is affirmed.

HULL, Acting P. J.

I concur:

HOCH, J.

ROBIE, J., Concurring and Dissenting.

I concur in parts I through III of the Discussion but dissent to part IV addressing defendant's argument that *Dueñas* calls into question the imposition of a $2,400 restitution fine and matching suspended parole revocation restitution fine, $367.80 main jail booking fee, $67.03 jail classification fee, $702 investigation fee, $25 urinalysis test, $4 emergency medical air transport fee, $440 court operations assessment, and $330 court facility assessment. (Citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157.)

I conclude defendant's claim is forfeited with regard to the restitution fines. Our Supreme Court has already determined an objection necessary to challenge the imposition of a restitution fine in excess of the mandatory minimum. (*People v. Nelson* (2011) 51 Cal.4th 198, 227.) As to the remaining fees and assessments, I agree with *Dueñas* that principles of due process would preclude a trial court from imposing the fines and assessments if a defendant demonstrates he or she is unable to pay them. (*People v. Dueñas*, *supra*, 30 Cal.App.5th at p. 1168.) I do not find the analysis in *Hicks*, *Aviles*, or *Caceres* to be well-founded or persuasive and believe the majority has it backwards -- the cases with which the majority agrees were wrongly decided, not *Dueñas*. (*People v. Hicks* (2019) 40 Cal.App.5th 320, review granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055; *People v. Caceres* (2019) 39 Cal.App.5th 917.)

I believe a limited remand under *Dueñas* is appropriate to permit a hearing on defendant's ability to pay the challenged fines and assessments because his conviction and sentence are not yet final. (See *People v. Castellano* (2019) 33 Cal.App.5th 485.

/s/
Robie, J.